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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 214

ANNA MARY WHITE,

Petitioner,

vs.

EVANSVILLE AMERICAN LEGION HOME ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION.

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EVANSVILLE AMERICAN LEGION HOME ASSOCIATION,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

Respondent will not burden the Court with another lengthy recital of the history of this case even though Petitioner's statement was not straightforward and unbiased. However, in order that the Court may understand our argument hereinafter raised concerning a dismissal of this petition, we must briefly refer to a portion of the Record.*

* Not having the benefit of the record before us or a printed appendix of pertinent portions of the record as required by Rule 23(f) we cannot make specific references thereto. For the convenience of the Court certain portions of the record (based upon a copy of the indices of the record furnished us by the Clerk of the Supreme Court of Indiana) are printed in the appendix attached hereto, and designaed as "R. A. ....". References to Petitioner's Appendix will be designated as "P. A. ....".

The second appeal in this case was initiated by Petitioner after the trial jury returned a verdict in favor of Respondent. Respondent cross-appealed contending that because of the prior judgment of October 25, 1960, the doctrine of *res judicata* barred Petitioner from recovering damages for her alleged personal injury. The Appellate Court found in favor of Respondent on the appeal and cross-appeal. (P. A. pp. A6-A52.)

The case was then transferred to the Supreme Court of Indiana. By way of cross-appeal, Respondent again raised the bar of the former judgment of October 25, 1960. Contrary to the Petitioner's assertion on page 9 and in other portions of her petition, the Indiana Supreme Court considered and decided only the questions presented by Petitioner on the appeal and did not consider and decide the questions presented by the cross-appeal relating to the bar of the former judgment of October 25, 1960. P. A. pp. A53-A62.)

The third and last appeal to the Indiana Appellate Court was initiated by Respondent. (See Petition p. 9.) The Appellate Court held that the doctrines of merger and *res judicata* prevented recovery in the case at bar. (P. A. pp. A63-A81.) Though Petitioner has stated that this decision was contrary to the decision of the Indiana Supreme Court on the second appeal, her accusation is not substantiated by the record. The Appellate Court specifically and correctly pointed out that the Indiana Supreme Court did not, on the second appeal, consider or decide the question presented by Respondent relating to the effect of the October 25, 1960 judgment. The Appellate Court expressly held that questions which might have been but were not decided on a previous appeal do not become "the law of the case" under Indiana law. (P. A. pp. A79-A80.)

Thereafter, the Indiana Supreme Court denied Petition-

er's Petition to Transfer the case to that Court. (P. A. p. A82.) It is extremely important to note at this point that Petitioner, in her petition for transfer filed with the Indiana Supreme Court, did not raise or even remotely refer to a federal constitutional question. (R. A. pp. A8-A15.) She first alleged a violation of so-called federal constitutional rights in her Petition for Rehearing in the Indiana Supreme Court on her Petition to Transfer. (R. A. pp. A16-A22.) Petitioner's statement under the heading "How Federal Question Presented" to the effect that she ". . . raised federal constitutional questions in numerous places in the state courts below . . ." is simply not borne out by the record. (Petition p. 10.)

OBJECTION TO JURISDICTION.

Pursuant to Rule 24(2) Rules of Supreme Court (28 USCA), Respondent objects to the jurisdiction of the Court to grant a writ of certiorari in the case at bar. Though Respondent does not fully understand what significant federal question Petitioner is now purporting to present, whatever question it may be was not timely presented to the Indiana Supreme Court. Assuming *arguendo* that Petitioner was deprived of certain federal rights—and she was not—such deprivation occurred when the state Appellate Court, relying on the doctrines of merger and *res judicata,* found against her on the third and last appeal, according to Petitioner. (Petition pp. 12, 25.)

If Petitioner believed her federal rights had been violated, she should have presented such questions in her Petition to Transfer to the Supreme Court of Indiana, but she failed to do so.. (R. A. pp. A8-A15.) Her petition raised questions of state procedural and substantive law only, and it was only state law which the state Supreme Court considered when denying her Petition to Transfer.

Federal questions were raised for the first time in the Petition for Rehearing in the state Supreme Court after her Petition to Transfer had been denied. (R. A. pp. A16-A22.)

This Court has consistently held that federal questions presented for the first time in a Petition for Rehearing before the highest state court come too late and that petitions for certiorari or appeals falling within this rule must be dismissed. *Herndon* v. *State of Georgia,* 295 U. S. 441, 443 (1935); *American Surety Co.* v. *Baldwin, et al.,* 287 U. S. 156, 163 (1932); *Rooker, et al.* v. *Fidelity Trust Co., et al.,* 261 U. S. 114, 117 (1923).

Furthermore, as we interpret the argument in her Petition for Writ of Certiorari, Petitioner states that she was deprived of certain constitutional rights by the Indiana Supreme Court's refusal to accept transfer and reverse the Appellate Court on this third and last appeal from which she seeks certiorari. Inconceivable as it may seem, in her Petition for Rehearing (R. A. pp. A16-A22) filed with the Indiana Supreme Court in the same appeal, she argued that she was deprived of her constitutional rights by the Supreme Court's refusal in the second appeal to consider and discuss the questions raised by Respondent (*not Petitioner*) on the Respondent's cross-appeal, with respect to the bar of the judgment of October 25, 1960, under the doctrine of *res judicata.* This argument is totally inconsistent with her position set forth in her Petition for Certiorari where she now says that the Supreme Court of Indiana did pass upon that question on the second appeal. (Petition, p. 20.)

Since Petitioner has failed to present the same questions in her Petition for Writ of Certiorari as she presented in her Petition for Rehearing before the state Supreme Court, this Court should dismiss the petition. The Court does not consider questions raised for the first time in the Peti-

tion for Writ of Certiorari. *Michel* v. *State of Louisiana*, 350 U. S. 91, 101 (1955); *Sonzinsky* v. *United States*, 300 U. S. 506, 514 (1937).

QUESTION PRESENTED.

Whether a state Appellate Court's decision, holding that under the procedural and substantive laws of that state, a verdict rendered on one paragraph of complaint and reduced to final judgment bars a second judgment on another paragraph of complaint where there is but one cause of action, violates any federal constitutional rights of the complaining party.

ARGUMENT.

1. No Substantial Federal Question Has Been Presented.

Rule 19(1)(a) Rules of Supreme Court (28 USCA) provides in substance that a writ of certiorari will be granted only when there has been a substantial federal question decided by a state court which has not heretofore been decided by this Court or has been decided in a way probably not in accord with similar decisions of the Court. No such question has been presented to this Court.

Indeed, it is extremely difficult to pinpoint what specific question or questions Petitioner has raised. Throughout her petition, Petitioner characterizes herself as an "old lady" who has been deprived of "due process" and "constitutional rights" by all the courts in the State of Indiana and by "this very powerful and omnipotent defendant." (Petition p. 24.) This sympathetic approach may work wonders before a jury, but it hardly has a place before the highest Court in our land. Brushing aside the camouflage and getting to the heart of the matter, what substantial federal question has been presented in the petition?

Petitioner makes vague reference to her right to trial by jury. She had three complete jury trials and could not recover simply because she failed to proceed in accord with Indiana procedural law. She makes equally vague statements about being deprived of property without due process of law, but she never had a vested right in the $17,750.00 judgment referred to since that judgment was subject to appeal; it was appealed and reversed. *Western Union Telegraph Company* v. *Louisville & Nashville Railroad Company,* 258 U. S. 13, 18 (1922); *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 450 (1923); *Sunray Oil Co.* v. *Commissioner of Internal Revenue* (10th Cir., 1945), 147 F. 2d 962, 963; cert. denied 325 U. S. 861 (1945).

Petitioner does not refer to a single Supreme Court decision, and she does not state that she has presented a substantial federal question not heretofore determined by this Court.

We submit that the filing of this petition is simply the end result of a long, complicated and arduous legal struggle relating solely to state law and in which the losing party could not accept defeat gracefully.

2. The Absence of Any Reason to Grant a Writ.

Under her heading "Reasons for Granting Writ," Petitioner has included four separate sections of argument. We must briefly refer to these arguments so that there will be absolutely no misunderstanding concerning the complete lack of merit in the petition.

3. Petitioner Has Not Been Deprived of Any Constitutional Right.

(Heading I of the Petition, pp. 13-16.)

As this case was being appealed through the state courts, Petitioner continuously twisted the facts and made statements completely unsupported by the record to serve her own end. In every reply brief filed by Respondent in the state courts, it was necessary to devote page after page simply to correct the record. Petitioner has seen fit to adopt this approach once again.

Petitioner states on page 14 of the petition that the state Appellate Court ". . . refused to abide by the law of the case that was laid down by the Supreme Court. . . ." Aside from the fact that we fail to see the significant federal question presented by this statement, it is unequivocally erroneous. In the Appellate Court's opinion it is expressly stated that the effect of the prior judgment rendered on October 25, 1960 was not decided by the Supreme Court, and, consequently, there had been no "law of the case" established as to that question by the Supreme Court. (P. A. pp. A79-A80.)

Petitioner then argues that she was burdened with a jury trial and appeal on a case that "ceased to exist" on October 25, 1960, and that her "judgment was confiscated."

To begin with, we have never understood Petitioner's use of the term "ceased to exist." The case is still in existence or Respondent would not be burdened with a reply to this ill-conceived petition.

Secondly, if Petitioner was subjected to a unnecessary trial, it was through no one's fault but her own. When this case was before the state Supreme Court on the second appeal, Respondent—not Petitioner—questioned the effect

of the prior judgment entered October 25, 1960. Petitioner argued that it was unnecessary for the Court to decide this question. She argued that the Court had no duty to decide the question. (R. A. pp. A1-A7.) The Court did not decide the question. (P. A. pp. A53-A62.) Accordingly, the issue was again raised on the third and last appeal, the Respondent obtained a ruling in its favor. Now Petitioner argues that this procedure subjected her to a needless trial! Such action is analogous to one who invites error on the part of a court and then attempts to take advantage of the same. Obviously, Petitioner would not have been subjected to another trial if on the second appeal the state Supreme Court had decided a question Petitioner then argued did not need deciding. Such an argument merits no further reply.

Finally we come to what is apparently the only constitutional question presented in the petition. Petitioner states on page 15 that the decisions of the state Appellate Courts have violated her, "... right to have a jury trial and to have her day in court as guaranteed under the Fourteenth Amendment to the Constitution of the United States." There is, of course, no authority cited by Petitioner in support of that statement.

In the first place, the Fourteenth Amendment does not guarantee anyone the right to a trial by jury in a civil action. The Seventh Amendment guarantees this right to trials brought in the United States Courts. But as this Court so clearly pointed out in *Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Co.*, 284 U. S. 151, 158 (1931):

> "* * * The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. * * *"

Indeed, jury trials in state civil actions may be modified or abolished by a state. *Wagner Electric Manufacturing Company* v. *Lyndon,* 262 U. S. 226, 232 (1923); *Olesen* v. *The Trust Company of Chicago,* 245 F. 2d 522, 524 (7th Cir., 1957), cert. denied 355 U. S. 896 (1957).

Even assuming the existence of some federal constitutional prohibition, Petitioner has not been deprived of any right to trial by jury. Petitioner had the benefit of three complete and two partial jury trials. She failed to follow state procedural law and allowed a directed verdict to be reduced to a final judgment. And as we have previously pointed out, Petitioner alone was responsible for initiation of the last jury trial before the effect of that prior judgment was decided by an appellate tribunal. Surely, under these circumstances, it cannot be said that some Fourteenth Amendment right has been deprived Petitioner.

4. There Has Been No Decision by a State Court of a Federal Question.

(Headings II and III of the Petition, pp. 16-23.)

The argument in her Petition under these two headings exemplifies Petitioner's basic misunderstanding of the requirements needed to pursue a Petition for Writ of Certiorari. Petitioner's argument thereunder is confined solely to state procedural and substantive law. We will not oblige Petitioner by again arguing state law. The issues have been argued and decided in the proper place—the state courts. Respondent is aware that this Court is not concerned with state law relating to negligence and judgments. Rule 19(1) (a) Rules of Supreme Court (28 USCA).

5. Petitioner Has Not Been Denied Due Process.

(Heading IV of the Petition, pp. 23-25.)

Under this heading, Petitioner has once again failed to present a substantial federal question. Instead she condemns and criticizes Respondent and the entire Indiana judiciary. Perhaps this section demonstrates more than any other how we think the Court should view this petition —as a vehicle of contempt driven by a disgruntled loser rather than as an instrument seeking to present substantial federal constitutional issues.

There is only one statement under this heading which deserves reply. On the bottom of page 23, Petitioner implies that she was denied due process of law by the state Supreme Court's failure to accept transfer of this case on the last appeal.

Petitioner has had her case reviewed by one appellate tribunal and is not constitutionally entitled to have it reviewed by another. We know of no decision—and have not been referred to one by Petitioner—which has held that the Fourteenth Amendment affords a litigant in a state civil action the right to two appellate reviews. When a statutory right of review is available, it must be exercised without discrimination, but the right of review or appeal is not essential to due process. *National Union of Marine Cooks and Stewards* v. *Arnold, et al.*, 348 U. S. 37, 43 (1954).

When as in the case at bar a state has afforded a litigant the opportunity to contest all constitutional and other questions fully in the trial court and in its Court of Appeals, such procedure plainly satisfies the requirement of due process under the Federal Constitution. *State of Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist. for Summit County et al.*, 281 U. S. 74, 80 (1930).

We submit that Petitioner has presented no important constitutional question for review, under this heading.

CONCLUSION.

The Respondent respectfully urges that the Petition for Writ of Certiorari filed herein should be denied for the reason that the Petitioner has failed to present a federal question of substance as required under the provisions of Rule 19(1) (a) and furthermore there has been no attempt on the part of the Petitioner to comply with Rule 23(4) which provides:

> "The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

For each of the above reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

IN THE SUPREME COURT OF INDIANA.

ANNA MARY WHITE,
Appellant,
vs.
EVANSVILLE AMERICAN LEGION HOME ASSOCIATION,
Appellee,
EVANSVILLE AMERICAN LEGION HOME ASSOCIATION,
Cross-Appellant,
vs.
ANNA MARY WHITE,
Cross-Appellee.

No. 30852.

BRIEF OF APPELLANT AND CROSS-APPELLEE IN OPPOSITION TO PETITION OF APPELLEE AND CROSS-APPELLANT FOR REHEARING.

Appellee and Cross-Appellant filed its Petition for Rehearing herein apparently contending that this Court must answer and refute every point set forth in the Appellate Court's opinion, regardless of how injudicious and unsound said opinion may be. Such a contention is clearly not the law of this State. When a case is accepted for transfer this Court considers it as if the case had originally been presented to the Supreme Court on appeal. The effect of an order to transfer *vacates* the decision of the Appellate

Court and expunges it from the record. This Court in *Kraus* v. *Lehman* (1907), 170 Ind. 408, at page 422 stated:

> "When the case was transferred the judgment of the Appellate Court was vacated, and the cause was then pending in the Supreme Court in like manner and to all intents and purposes as though it had been appealed directly to the latter Court."

In *Chesapeake and Ohio Railway Company* v. *Burk* (1961), 175 N. E. 2d 137, this Court held on page 139:

> "Transfer to this court was accepted because of the enunciation of the erroneous principles of law contained in the opinion of the Appellate Court, as heretofore discussed. Having accepted transfer of the case, this court is obliged to consider the case as if it were originally presented to this court on appeal."

On this same point see also: *Princeton Coal etc., Company* v. *Gilmore* (1907), 170 Ind. 366, 83 N. E. 500; *Avery* v. *Nordyke and Marmon Company* (1905), 164 Ind. 186, 73 N. E. 119; *Ostor* v. *Broe* (1902), 161 Ind. 113, 64 N. E. 918; *Payne* v. *Terre Haute and I. R. Co.* (1902), 157 Ind. 616, 62 N. E. 472; *So. Ry. Co.* v. *Ingle* (1946), 117 Ind. App. 229, 69 N. E. 2d 746; *Ind. Law Encyclopedia,* Vol. 7, Courts Section 111, p. 512.

The Appellate Court's opinion in this case covered fifty-two typewritten pages and was perhaps one of the most confused and perplexing opinions ever handed down in this state. The Appellate Court spent nearly ten typewritten pages on the alleged Cross-errors, attempting to explain how two separate paragraphs of complaint setting forth two distinct legal theories merged into a final judgment when the trial court directed a verdict on one paragraph and allowed the case to go to the jury on the second, or remaining paragraph.

While it is virtually impossible to interpret the Appellate

Court's opinion with respect to the alleged Cross-errors, one of two things obviously happened. Either the Appellate Court was misled by Cross-Appellant into the erroneous belief that there was a final judgment as to *all* the issues before the Court and that sometime later a second paragraph was filed after the failure of the first paragraph (which is not true); or the Appellate Court merely decided that if a plaintiff chose to proceed on more than one theory he had to sustain each and every theory as set forth in separate paragraphs of complaint.

In the first instance, the Appellate Court's opinion would be contrary to the facts and the record in this case as appellant pleaded two separate and distinct legal theories at *one time,* which were before the Court in one proceeding, and thereafter the trial court held there was insufficient evidence to support paragraph one of complaint but that there was sufficient evidence to allow the case to go to the jury on paragraph two of complaint.

The only other possible explanation of the Appellate Court's opinion is that the Appellate Court decided to change the law and require that a plaintiff, in order to prevail, must prove *every* theory pleaded.

However, it remains absolutely immaterial what the Appellate Court thought the facts to be or what it presumed the law was, or should be, for this Court is not bound by the Appellate Court's impression of the law, nor is this Court required to accept the "facts" as stated in the Appellate Court opinion.

In *Riverside Coal Company et al.* v. *North Indianapolis Cradle Works* (1923), 194 Ind. 176, 142 N. E. 377, a petition for rehearing was filed challenging the Supreme Court's opinion on the basis that the Supreme Court did not refer to the Appellate Court's opinion and did not point out the reasons why the cause was transferred from the Appellate

Court. This Court in overruling the petition for rehearing stated:

> "The petition for a rehearing filed by appellants seems to challenge the opinion of this court for not pointing out the reason for which the cause was transferred from the Appellate Court. In its opinion, the Appellate Court had assumed to state a rule of law in terms which the Supreme Court deemed erroneous, and not proper to serve as a guide in deciding similar questions that may arise in other cases. Being convinced that the opinion of that court erroneously declared the law in some particulars, the Supreme Court transferred the case to its own docket. § 1394, cl. 2, Burns 1914, Acts 1901, p. 567, § 10; Barnett v. Bryce Furnace Co. (1901), 157 Ind. 572, 62 N. E. 6; American Quarries Co. v. Lay (1906), 166 Ind. 234, 76 N. E. 517. Having done so, the court proceeded to decide the case as if it had been transferred in any other of the several ways provided by law (§§ 1405, 1425, 1429 Burns 1914, Acts 1901, p. 590, Acts 1893, p. 293, Acts 1893, p. 29) for removing a case from one court to the other. By such an order of transfer 'the judgment of the Appellate Court is vacated', and, in deciding the case, neither criticism of, nor reference to, the opinion of the other court is necessary. § 1394, cl. 2, Burns 1914 supra.
>
> The petition for a rehearing is overruled."

Recently, Judge Achor, speaking for this Court in *Chesapeake and Ohio Railway Company* v. *Burk* (1961), 175 N. E. 2d 137, on page 139 of the opinion said:

> "Furthermore, this court having accepted transfer from the Appellate Court, its consideration of the case is not limited nor is it required to accept the facts as stated in the opinion of the Appellate Court."

The Appellate Court's opinion in this case no longer stands and the Supreme Court of Indiana is under no obligation or duty to answer a baseless contention raised by Appellee and Cross-Appellant and decided by the Appellate

Court, particularly when such contention is completely contrary to the well established law of this state. Certainly there is no better established principle of law than the principle that a plaintiff may proceed simultaneously on numerous legal theories as set forth in various paragraphs of complaint and recover on *any one* of said paragraphs. Obviously this Court did not wish to add confusion to the well established body of law on this subject by attempting to untangle and explain the Appellate Court's opinion regarding the alleged Cross-error.

In reversing this cause and sending it back for a new trial, this Court clearly and explicitly overruled Appellee and Cross-Appellant's claim of Cross-error, which was not only frivolous but completely devoid of any merit whatever. To require this Court to give an explanation and an opinion on every point raised by an Appellant or Cross-Appellant, regardless of merit, would inundate the Court and the legal profession with redundant and unnecessary legal opinions.

This Court in *Cichos* v. *State* (1965), 210 N. E. 2d 363, 364, recently explained that it intentionally omitted the discussion of various questions arising in the record and stated:

> "We intentionally omitted from our discussion those 'questions arising in the record' which seemed frivolous, were not supported by substantial argument in the briefs or were so patently contrary to the well-established law of the state since a discussion thereof would merely constitute an unjustifiable encumbrance of the reported decisions of the state without making any contribution to the general body of the law."

The Supreme Court of Indiana has consistently held that the constitutional directive requiring a statement on each question must of necessity be given a reasonable construction and that it is unnecessary for the Court to en-

cumber the record where the law is firmly established on a certain issue. *State ex rel. Sluss* v. *Appellate Ct. of Ind.* (1938), 214 Ind. 686, 17 N. E. 2d 824; *Willets* v. *Ridgway* (1857), 9 Ind. 367; *Appelby* v. *State* (1943), 221 Ind. 544, 48 N. E. 2d 646; *Weer* v. *State* (1941), 219 Ind. 217, 37 N. E. 2d 537.

On this very point this Court in *Cichos* v. *State* (1965), 210 N. E. 2d 363, 366, recently said:

> "As previously stated, the above specifications of error were not previously considered by this court in its opinion but were omitted because they were patently without merit, and although the constitution provides that the court 'give a statement in writing of each question arising in the record' of such case, we are of the opinion that the law is so firmly established with regard to the specifications of error asserted by appellant that there is, in reality, no substantial question with regard to such specifications and, therefore, that within a reasonable construction of the constitutional directive it was unnecessary that the court encumber the opinion with a discussion of this voluminous subject matter."

Obviously Appellee and Cross-Appellant recognizes the sound and irrefutable basis for the Indiana Supreme Court's opinion in this case and has, therefore, resorted to the citation of United States Supreme Court cases involving questions of criminal law under the 14th Amendment in an apparent effort to lay the foundation for an appeal to the United States Supreme Court. Such an unwarranted attempt by Appellee and Cross-Appellant would be most reprehensible in this particular case. If this is the type case which can be appealed to and decided by the Supreme Court of the United States, then the high courts of each state have no real function and might as well be abolished.

Conclusion.

Where a contention is patently without merit, as is the case with respect to Appellee and Cross-Appellant's Petition for Rehearing, there is no substantial question before this Court and the Court need only discuss the principal contentions or issues which sustain the decision of this Court. This has been accomplished by the Court in the instant case in a most conclusive and decisive manner. It is respectifully submitted that Appellee and Cross-Appellant's Petition for Rehearing be overruled.

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IN THE SUPREME COURT OF INDIANA.

Appeal from the Warrick Circuit Court

Warrick County, Indiana.

EVANSVILLE AMERICAN LEGION HOME ASSOCIATION,
Appellant,
vs.
ANNA MARY WHITE,
Appellee.

No. 20,700
(Appellate Court)

PETITION OF APPELLEE, ANNA MARY WHITE TO TRANSFER THE ABOVE CAUSE TO THE SUPREME COURT OF INDIANA.

The Appellee in the above entitled cause respectfully shows the Court:

1. That the judgment of the Warrick Circuit Court herein, in favor of this Appellee, was reversed by the Second Division of the Appellate Court of Indiana on the 8th day of November, 1967, and that the Appellate Court decided the case with a written opinion filed on said date, copy of which is attached hereto.

2. That the decision of the Appellate Court was against the Appellee, this petitioner.

3. That this petitioner filed her application for a rehearing with the Clerk of this Court on the 27th day of November, 1967, which date is within twenty (20) days of the rendition of the decision.

4. That said petition for rehearing was denied by the

Appellate Court on the 1st day of December, 1967, which date is within twenty (20) days before the time of the filing of this petition. That at the time of the filing of this Petition for Transfer, Appellee has made a cash deposit with the Clerk of the Supreme Court of Indiana in the sum of Fifty Dollars ($50.00), in accordance with the provisions of Section 4-215, Burns Indiana Statutes, 1933.

5. Now, therefore, Appellee petitions the Supreme Court of Indiana that the above entitled cause be transferred to the Supreme Court of Indiana, for the following reasons and each of them:

I.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that the doctrines of merger and *res judicata* put an end to this cause of action in 1960 when Appellee (plaintiff) by two paragraphs of complaint proceeded simultaneously under two legal theories and the trial court directed the jury to return a verdict for Appellant (defendant) on one paragraph of complaint, but submitted the cause to the jury on the remaining paragraph of complaint.

The ruling precedent violated by the Appellate Court's opinion was the clearly established rule that in this state a pleader may state his cause of action in various forms in different paragraphs of complaint, go to trial on them all, and recover on *any one* of said paragraphs which is sustained by the evidence. The effect of the Appellate Court's decision herein destroys this established legal principle and holds that if a plaintiff fails to sustain any one of his paragraphs of complaint and the defendant moves for a judgment thereon, then all other pending paragraphs of complaint merge into the judgment had on this one paragraph of complaint, even though the evidence

supports or sustains one or more of the other paragraphs of complaint then pending. Such holding is contrary to the ruling precedent in the case of *Bruck* v. *State ex rel. Money* (1950), 228 Ind. 189, 204, 91 N. E. 2d 349.

II.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that the doctrines of merger and *res judicata* put an end to this cause of action in 1960 when the trial court held that there was insufficient evidence to sustain paragraph one of Appellee's (plaintiff's) complaint, based on the doctrine of *res ipsa loquitur*, and directed a verdict on same, but at the same time refused to direct a verdict on paragraph two of complaint, alleging specific acts of negligence, and thereupon submitted said remaining paragraph of complaint to the jury.

The ruling precedent violated by the Appellate Court's opinion was that this precise point was raised, briefed and argued by Appellant (then Cross-Appellant) before the Supreme Court of Indiana on the 21st day of September, 1965, and this very Court rejected this theory, but instead granted Appellee (then Cross-Appellee) a new trial on the 15th day of October, 1965. *White* v. *Evansville American Legion Home Association* (1965), ____ Ind. ____, 210 N. E. 2d 845. Issues raised on a previous appeal and disposed of by this Court thereby become the law of the case and the Appellate Court, as well as the litigants are bound thereby. *Bahre* v. *Bahre* (1967), ____ Ind. ____, 230 N. E. 2d 411, 414.

III.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that the doctrines of merger and *res judicata* put an end to this cause of action in 1960 when the trial court held that there was insufficient evidence to sustain paragraph one of Appellee's (plaintiff's) complaint, based on the doctrine of *res ipsa loquitur*, and directed a verdict on same, but at the same time refused to direct a verdict on paragraph two of complaint, alleging specific acts of negligence, and thereupon submitted said remaining paragraph of complaint to the jury.

The ruling precedent violated by the Appellate Court's opinion was that said opinion is in direct contravention of this Court's recent decision herein decided on October 15, 1965, and cited as *White* v. *Evansville American Legion Home Association* (1965), 210 N. E. 2d 845. If the most recent Appellate Court decision, holding that this case ended in 1960, is allowed to stand, the Supreme Court is thereby placed in the position of rendering a decision in 1965 on a case which had ceased to exist five years previously. The Appelate Court's decision herein completely destroys and nullifies this Court's opinion as found at 210 N. E. 2d 845.

IV.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that the Supreme Court's decision in *Evansville American Legion Home Association* v. *White* (1959), 239 Ind. 138, 154 N. E. 2d 109, precluded the case from being tried *de novo*. The reason why the Appellate Court's opinion is erroneous in this respect is because the Supreme Court's holding concerning *res ipso loquitur* was applicable only to the evidence introduced in that particular trial.

V.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that the Supreme Court's decision in *Evansville American Legion Home Association* v. *White* (1959), 239 Ind. 138, 154 N. E. 2d 109, precluded plaintiff from proceeding under the doctrine of *res ipsa loquitur* at a trial *de novo* where new and additional evidence could be introduced. The reason why the Appellate Court's opinion is erroneous in this respect is because said opinion is contrary to the decision of *Egbert* v. *Egbert et al* (1955), 235 Ind. 405, 132 N. E. 2d 910.

VI.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that the judgment of October 25, 1960, on one of two pending paragraphs of complaint was a final judgment..

The reason why the Appellate Court's opinion is erroneous in this respect is because the judgment of October 25, 1960, on paragraph one of complaint only disposed of one of the two paragraphs of complaint then pending before the trial court, and was therefore not a final judgment. This is contrary to the ruling precedent in *Champ et al* v. *Kendrick, trustee* (1891), 130 Ind. 545, 546, 30 N. E. 635, wherein the Supreme Court of Indiana held:

> "A judgment is not final unless all the issues of law and fact are determined, and the case completely disposed of, so far as the court had the power to dispose of it."

VII.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that Appellee (plaintiff) should have appealed after the trial court directed the jury to return a verdict for Appellant (defendant) on paragraph one of complaint, but submitted paragraph two of complaint to the jury.

The ruling precedent violated by the Appellate Court's opinion was that said decision was in direct conflict with the legal principle that a party cannot appeal a case piecemeal. This Court in *The Western Union Telegraph Company* v. *Locke, Administrator* (1886), 107 Ind. 9, 10, 7 N. E. 579, set forth the following quotation with approval on page 10 of said volume:

> "The appellee courts will not review cases by piecemeal. The interests of litigants require that cases should not be prematurely brought to the higher courts."

VIII.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that when the trial court directed the jury to return a verdict for Appellant (defendant) on paragraph one of complaint, but submitted paragraph two of complaint to the jury, that Appellee's (plaintiff's) entire cause of action merged into the judgment had on paragraph one of complaint.

The ruling precedent violated by the Appellate Court's opinion was that said decision was directly contrary to the established legal principle that a trial court may direct a verdict as to one of several pending paragraphs of complaint without adversely affecting a party's right to proceed on the remaining paragraph or paragraphs of complaint which are supported by the evidence. The rendition

of a judgment by a trial court on one paragraph of complaint is not final nor is it *res judicata* as to the remaining paragraphs of complaint. *Pokraka* v. *Lummus Co.* (1951), 230 Ind. 523, 104 N. E. 2d 669; *Dagley* v. *Armstrong Rubber Company* (1965), 344 F. 2d 245; *New York Central Railway Company* v. *Verkins* (1954), 125 Ind. App. 320, 122 N. E. 2d 738; *Chicago, etc. R. Co.* v. *Pacheco* (1931), 94 Ind. App. 353, 181 N. E. 7.

IX.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that Appellee (plaintiff) did not have the legal right to plead, and proceed to trial with her cause of action in various forms, but that she was required to elect on which paragraph she would go to trial.

The ruling precedent violated by the Appellate Court's decision is the rule of law which gives a party the right to state his cause of action in as many forms as he desires, go to trial on them all, and recover on any one paragraph which is warranted by the evidence. *Bruck* v. *State ex rel. Money* (1949), 228 Ind. 189, 91 N. E. 2d 349.

X.

The opinion of the Appellate Court contravenes a ruling precedent of the Supreme Court in holding that when the trial court directed the jury to return a verdict for Appellant (defendant) on paragraph one of complaint, but submitted paragraph two of complaint to the jury, that Appellee's (plaintiff's) entire cause of action merged into the judgment had on paragraph one of complaint. The reason why the Appellate Court's opinion is erroneous in this respect is because Appellant (defendant) did not make any objection of any type whatsoever at the time the trial

judge directed a verdict on paragraph one, but permitted paragraph two of the complaint to go to the jury. It was not until eight months later before a different trial judge that Appellant's (defendant's) counsel first brought forth his unprecedented theory of merger and *res judicata* and Appellant (defendant) has thereby wholly waived such theory. A party cannot stand by, participate in further proceedings and fail to object to the trial court's action in submitting the case to the jury on a remaining paragraph of complaint, and then be heard to complain eight (8) months later before a different trial judge. Such attempted procedure has been repeatedly condemned by the Supreme Court of the State of Indiana. *State* v. *Gilkison* (1935), 208 Ind. 416, 196 N. E. 231; *Harker et al.* v. *Eisenhut* (1937), 212 Ind. 67, 6 N. E. 2d 936; *Ross, Receiver* v. *Terre Haute, etc. Traction Co.* (1930), 202 Ind. 698, 171 N. E. 665; *Meadows* v. *Thomas* (1917), 187 Ind. 216, 118 N. E. 811.

WHEREFORE, Appellee respectfully petitions this Court to transfer this case to the Supreme Court and to set aside and annul said erroneous judgment in the Appellate Court and to affirm the judgment of the Warrick Circuit Court rendered on the 29th day of July, 1966.

Respectfully submitted,

JOHN H. JENNINGS,
HAROLD M. WILSON, JR.,
By HAROLD M. WILSON, JR.,
Attorneys for Appellee.

Oral argument has been requested by separate petition.

JOHN H. JENNINGS,
HAROLD M. WILSON, JR.,
By HAROLD M. WILSON, JR.,
Attorneys for Appellee.

IN THE SUPREME COURT OF INDIANA.

Appeal from the Warrick Circuit Court.

EVANSVILLE AMERICAN LEGION HOME ASSOCIATION,
Appellant,
vs.
ANNA MARY WHITE,
Appellee.
} No. 20,700.

APPELLEE'S PETITION FOR REHEARING.

NOTE: Because of the fact that both the defendant and plaintiff have alternately been appellant and appellee in the several appeals, we shall herein refer to these parties as defendant and plaintiff, or the Association and Mrs. White.

The plaintiff, Anna Mary White, petitions this Honorable Court for a rehearing in the above entitled cause and respectfully represents and shows to this Court as follows:

After this case was tried in the lower court for the fourth time, the plaintiff finally obtained an adverse verdict. She appealed from said verdict to the Appellate Court and said Appellate Court rendered a decision thereon on June 11, 1965, ... Ind. App. ....., 207 N. E. 2d 320. Said Appellate Court rejected the plaintiff's contentions and upheld said adverse verdict for that reason but it also sustained the defendant association's cross-errors and affirmed the judgment holding that a judgment on one paragraph of complaint which had previously been ren-

dered in this cause on October 25, 1960 was a final judgment which ended the case in 1960.

Mrs. White, in due time thereafter, filed a petition for transfer to this Supreme Court, which said petition this Court granted. This Court then reversed the Appellate Court's said decision and granted Mrs. White a new trial. See *White* v. *Evansville American Legion Home Association,* ..... Ind. App. ..... (Oct. 15, 1965), 210 N. E. 2d 845. However, at the time this Court granted plaintiff a new trial and reversed the Appellate Court's decision it did not in writing pass upon or make any ruling whatsoever concerning said alleged final judgment of October 25, 1960, or said cross-errors, although same were *thoroughly argued in oral argument and were thoroughly and completely and timely briefed.*

The defendant even filed a petition for rehearing before this Court and a brief accompanying same and thereafter a reply brief and all were *devoted entirely to the contended error that this Supreme Court omitted to give a decision in writing on said cross-errors.* A copy of said petition is filed herewith, marked Exhibit A and made a part hereof.

Despite all of said efforts said petition and briefs and oral arguments on same, this Court failed and refused to give any opinion in writing concerning whether or not said contended judgment of October 25, 1960 was a final judgment and this said Court overruled said petition for a rehearing and this said Court has continued and still continues to refuse to "give a statement in writing" as required by Article 7, Section 5 of the Constitution of the State of Indiana.

Pursuant to the decision of this Supreme Court and the order therein made ordering a new trial herein, Mrs. White's case was retried the fifth time in July, 1966 and she obtained another verdict which is the verdict involved in this instant appeal. The Appellate Court again reversed

said verdict and again based said reversal on the fact that the judgment of October 25, 1960 was a final judgment. Said decision was practically identical with its former opinion on this question of whether or not the judgment of October 25, 1960 was a final judgment. Said Appellate Court further held that despite the fact that this Supreme Court had ordered a new trial for the plaintiff, it was free to re-write its former opinion because the Supreme Court had failed to pass upon and write an opinion concerning said cross-errors which raised the question as to whether or not the judgment of October 25, 1960 was a final judgment. Although this Supreme Court assumed jurisdiction of this case, it has never passed upon the question of whether or not the said judgment of October 25, 1960 was a final judgment. It is the Supreme Court's constitutional duty to do this and once it assumed jurisdiction it cannot delegate this constitutional duty to the Appellate Court and thereby deprive Mrs. White of her rights under the Indiana and United States Constitution.

The plaintiff has been denied her constitutional rights as follows:

1. The Supreme Court, by its failure to render a decision and a statement in writing on the question as to whether the judgment of October 25, 1960 on one paragraph of complaint was a final judgment has deprived Mrs. White of her rights under and pursuant to Article 7, Section 5 of the Constitution of the State of Indiana, which is as follows:

> "The Supreme Court shall, upon decision of every case, give a statement in writing of each question arising in the record of such case, and a decision of the court thereon."

2. The Supreme Court by its failure to render a decision and a statement in writing on the question as to whether the judgment of October 25, 1960 on one para-

graph of complaint was a final judgment has failed to render a decision necessary to the final determination of the cause, contrary to Article 7, Section 5 of the Constitution of the State of Indiana.

3. The Supreme Court by its failure to render a decision and give a statement in writing on the question as to whether the judgment of October 25, 1960 on one paragraph of complaint was a final judgment has deprived Mrs. White of her right of judicial review, contrary to Article 1, Section 12 of the Constitution of the State of Indiana, which is in the following words:

> "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

4. The Supreme Court by its failure to render a statement in writing on the question as to whether the judgment of October 25, 1960 on one paragraph of complaint was a final judgment and in permitting the Appellate Court to do this has deprived Mrs. White of the privileges and immunities and equal protection of the laws of Article 1, Section 23 of the Constitution of the State of Indiana, which is as follows:

> "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

5. The Supreme Court by its failure to render a decision and give a statement in writing on the question as to whether the judgment of October 25, 1960 on one paragraph of complaint was a final judgment has deprived Mrs. White of her rights under the due process of law in violation of

and contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

6. The Supreme Court has deprived Mrs. White of the equal protection of the laws contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States of America, by its failure to render a decision and give a statement in writing on the question as to whether the judgment of October 25, 1960 on one paragraph of complaint was a final judgment.

7. The Supreme Court by its failure to render a decision and give a statement in writing on the question as to whether the judgment of October 25, 1960 on one paragraph of complaint was a final judgment has deprived Mrs. White of the equal protection of the laws of the State of Indiana, in violation of the Fourteenth Amendment of the Constitution of the United States of America.

8. The Supreme Court by its failure to render a decision and give a statement in writing on the question as to whether the judgment of October 25, 1960 on one paragraph of complaint was a final judgment has discriminated against Mrs. White by depriving her of the equal protection of the laws afforded to other litigants similarly situated, in violation of the Fourteenth Amendment of the Constitution of the United States.

9. The Supreme Court by its failure to render a decision and give a statement in writing on the question as to whether the judgment of October 25, 1960 on one paragraph of complaint was a final judgment and thereby permitting the decision of the Appellate Court to stand, has, in effect, permitted the Appellate Court of Indiana to write the Supreme Court's decision. The Supreme Court cannot delegate this Constitutional requirement to the Appellate Court. It must write its own opinion.

10. The Supreme Court by granting the plaintiff herein

a new trial in *1965, White* v. *Evansville American Legion Home Association,* 210 N. E. 2d 845, ... Ind. App. ....., which resulted in a judgment for the plaintiff for the sum of $17,750.00 and costs, and by *now* allowing and permitting the Appellate Court to rewrite for the second time the Appellate Court's former opinion holding that plaintiff's cause of action ended in *1960* (207 N. E. 2d 820, ... Ind. App. ....., and 230 N. E. 2d 623, ... Ind. App. .....) has thereby deprived the plaintiff of her property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

11. This Court took the jurisdiction of this case away from the Appellate Court, reversed said Appellate Court's decision which held that the judgment of October 25, 1960 was a final judgment which ended the case in 1960 and then granted the plaintiff a new trial. (See *White* v. *Evansville American Legion Home Association* (1965), 210 N. E. 2d 845, ...Ind. App. .....). Pursuant to the order of this Supreme Court the plaintiff retried her case (fifth time) and obtained a judgment in the amount of $17,750.00 and costs. On the defendant's appeal from said judgment the Appellate Court reversed the case and based its reason for reversal solely on the ground that the judgment of October 25, 1960 was a final judgment and ended the case in 1960. This was the identical former holding of the Appellate Court and is contrary to this Court's above said ruling. Despite this action on the part of the Appellate Court and although the Supreme Court took over jurisdiction of this case, it has failed and refused to render a decision of any type on said question as to the validity of said judgment of October 25, 1960, although proper and timely petitions and briefs have presented the matter to this Court, but this Court has permitted the said Appellate Court decision to be the law of this case, although said Appellate Court decision holds that this case was dead and ceased to exist

five years before this Supreme Court wrote said above opinion granting plaintiff a new trial. This Supreme Court has thereby deprived the plaintiff of her property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States. Said deprivation of property consists not only of the deprivation of her said judgment of $17,750.00 and costs, but also the burden and expense of a retrial and appeal on a case that has ceased to exist.

WHEREFORE, Anna Mary White respectfully petitions this Court for a rehearing and upon the rehearing that said Court transfer said cause to this Court and that said Court render a decision and statement in writing on the questions presented by said Cross-errors and that the said judgment of October 25, 1960 be held not to be a final judgment and that it annul said erroneous judgment of the Appellate Court and affirm the judgment of the Warrick Circuit Court rendered on the 29th day of July, 1966.

Respectfully submitted,

JENNINGS & WILSON,
By HAROLD M. WILSON, JR.,
Attorneys for Appellee.